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No. _____

Supreme Court, U.S.
FILED

941570 MAR 21 1995

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DENNIS RELLA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether as an element of 18 U.S.C. §1962(d), RICO conspiracy to violate 18 U.S.C. §1962(c), the government must satisfy the "operation or management" test announced by the Court in Reves v Ernst and Young, 113 S.Ct. 1163 (1993) by proving that a defendant agreed to participate in directing the RICO enterprise's affairs or agreed that predicate acts be committed under the direction of upper management?

LIST OF PARTIES

Apart from Petitioner Dennis Rella, the other parties to the appeal before the United States Court of Appeals for the Second Circuit were Joseph P. Napoli, Harold M. Fishman, Marty Gabe and Alan Weinstein, as appellants, and the respondent, United States of America.

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DENNIS RELLA,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Dennis Rella respectfully prays that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals for the Second Circuit, entered on January 24, 1995, which upon rehearing corrected factual inaccuracies and confirmed its original determination, dated August 4, 1994, affirming the Order of the United States District Court,

Eastern District of New York (Sifton, J.), entered on August 28, 1994.[1]

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[1] Petitions for Certiorari will be filed by mid-April, 1995, on behalf of Petitioner's co-petitioners, Alan Weinstein and Marty Gabe. Those petitions will raise issues similar to those raised in this Petition. Petitioner Rella joins in the arguments made on behalf of Weinstein and Gabe, to the extent applicable, and requests that his Petition be held in abeyance until petitions are filed on their behalf.

OPINION BELOW

The opinion of the Court of Appeals is officially reported at 32 F.3d 31 (2d Cir. 1994) and appears in the Appendix as 1a-13a. The opinion of the Court of Appeals granting rehearing, correcting factual inaccuracies, and confirming the original determination, is not officially reported, but appears in the Appendix as 14a-22a.

The Court of Appeals, in its original opinion entered August 4, 1994, affirmed the Order of the United States District Court, Eastern District of New York [Sifton, J.], denying Petitioner's motion, pursuant to 28 U.S.C. §2255, to vacate and set aside his RICO conspiracy conviction. In its January 24, 1995 opinion, the court granted rehearing to Petitioner Rella, corrected factual inaccuracies in its original opinion, and confirmed its original determination.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

The Order of the Court of Appeals sought to be reviewed, which granted rehearing, corrected factual inaccuracies, and confirmed the August 4, 1994 determination, was filed on January 24, 1995. Petitioner was permitted to remain at liberty, pending a disposition of his Petition for Certiorari, by Order of the United States Court of Appeals, Second Circuit, filed on February 17, 1995.

This Petition for a Writ of Certiorari is filed within the time prescribed by U.S. Sup.Ct. Rule 13, 28 U.S.C.A., and Rule 41(b) of the Federal Rules of Appellate Procedure.

STATUTES INVOLVED

18 U.S.C. § 1962(c):

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt."

18 U.S.C. § 1962(d):

"It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

STATEMENT OF THE CASE

Petitioner Dennis Rella, and six other persons, were accused by a grand jury of violating the federal anti-racketeering statute (18 U.S.C. § 1962[c]), and conspiring to violate the federal anti-racketeering statute (18 U.S.C. §1962[d]). Identified in the indictment were twenty-six racketeering acts, in which were alleged the commission of mail fraud (18 U.S.C. §1341) and bribery (N.Y. Penal Law §§200.00 and 215.00), in connection with the representation of plaintiffs in eighteen personal injury actions by persons employed by or affiliated with the Morris J. Eisen, P.C., law firm. Petitioner was named in six racketeering acts.[1]

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[1] Also named in the indictment as co-defendants/co-conspirators were attorneys Morris J. Eisen, Joseph P. Napoli and Harold Fishman; investigators Al Weinstein and Marty (continued...)

Petitioner and his six co-defendants pleaded not guilty and, on November 4, 1990, proceeded to trial before Hon. Charles P. Sifton, U.S.D.J., and a jury. The trial continued until March 4, 1991, when the jury, after deliberating for three weeks, found Petitioner and his six co-defendants guilty of RICO and RICO conspiracy. However, the district court set aside that part of the jury verdict finding Petitioner guilty of RICO on the ground that the three racketeering acts he was found to have committed did not fall within the statute of limitations.

In essence, the theory of the prosecution was that Petitioner and his six co-defendants fabricated evidence, suborned perjury, bribed witnesses and committed

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[1](...continued)
Gabe; and the office administrator, Geraldine Morganti. The RICO enterprise was alleged to be the law firm, Morris J. Eisen,P.C.

mail fraud in connection with the representation by Morris J. Eisen, P.C., of plaintiffs in personal injury cases. Regarding Petitioner Rella, the government theorized that he committed these crimes while providing investigative services to the Eisen firm to facilitate the successful prosecution of these personal injury actions.

Petitioner and his co-defendants appealed, and the United States Court of Appeals, Second Circuit, affirmed (974 F.2d 246 [1992]). Thereafter, petitions for certiorari were filed on behalf of Petitioner and his six co-defendants.

While the petitions were pending, this Court announced its decision in Reves v Ernst and Young, 113 S.Ct. 1163 (1963). Petitioner and his co-defendants filed supplemental petitions, raising the same Reves issue which had been raised by co-defendant Napoli in his original petition

for certiorari. Certiorari was denied as to Petitioner and the six co-defendants, including co-defendant Napoli (see 113 S.Ct. 1619, 1840, 1841 [1993]).

In or about August, 1993, Petitioner and co-defendants Napoli, Fishman, Weinstein, and Gabe, sought the vacatur of their convictions, pursuant to 28 U.S.C. §2255, on the ground that Reves v Ernst and Young, supra, had announced a new rule of substantive law, i.e., the "operation or management" test to determine §1962(c) liability, and that, consequently, their jury had evaluated their respective cases under the erroneous (and now discredited) standard previously established by the Second Circuit in United States v Scotto, 641 F.2d 47, 54 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981). (See 16a-17a).

Finding that Reves was applicable to their cases, the district court

nevertheless denied §2255 relief because, in the district court's opinion, the charge actually given to the jury satisfied the essence of Reves, and because any error was harmless (7a).

On appeal, the Second Circuit affirmed, albeit on different grounds (Napoli v United States, 32 F.3d 31). As to Petitioner and co-defendants Weinstein and Gabe, the court found that, unlike co-defendants Napoli and Fishman (12a), review of their substantive (Reves) claim was procedurally barred because they failed to raise the claim before their direct appeals were exhausted, i.e., the claim could have been raised in their petitions for certiorari (12a-14a).

On Petition for Rehearing, filed on behalf of Petitioner and co-defendants Weinstein and Gabe, irrefutable evidence was submitted to the court which established that, identical to co-defendant

Fishman, whose claim was not found to be procedurally barred, Petitioner and co-defendants Weinstein and Gabe had indeed raised their respective Reves claim in their supplemental petitions for certiorari before this Court denied their petitions (18a-19a).

Nevertheless, the Second Circuit, granting rehearing, corrected the factual inaccuracies in its original determination, but confirmed that determination. Without any discussion of Petitioner Rella's role or relationship to the RICO enterprise, the court explained that,

> "Petitioner Gabe carried out instructions from the law firm principals and exercised broad discretion in doing so. In one case he followed the directions of the trial attorney, Fishman, to bribe a witness not to testify and assisted Fishman in instructing two witnesses to testify falsely. In another case, he was instructed by *** the office manager, to photograph a pothole that supposedly gave rise to a personal injury claim and took it upon himself to

enlarge the pothole before photographing it. Weinstein attempted to bribe a witness to testify falsely in one case, and in two cases helped Fishman coach witnesses on false testimony. Clearly, Gabe and Weinstein were high up on the 'ladder of operation' and were guilty of the substantive RICO charges on which they were convicted. Petitioner Rella was convicted only on the RICO conspiracy charge, and that conviction is unaffected by the Reves error. *** Reves likewise does not affect the conspiracy convictions of Gabe and Weinstein" (21a; emphasis added).

REASONS FOR GRANTING THE WRIT

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED CONCERNING THE APPLICABILITY TO 18 U.S.C. §1962(d), RICO CONSPIRACY TO VIOLATE RICO, 18 U.S.C. §1962(c), OF THE "OPERATION OR MANAGEMENT" TEST, TO DETERMINE A DEFENDANT'S LIABILITY UNDER §1962(c), ANNOUNCED BY THE COURT IN REVES v ERNST & YOUNG, 113 S.Ct. 1163 (1993).

In Reves v Ernst & Young, 113 S.Ct. 1163 (1993), the Court, resolving the inter-circuit conflicts concerning the meaning of the phrase in 18 U.S.C. §1962(c) "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs", adopted the "operation and management" test (see Bennett v Berg, 710 F.2d 1361, 1364 [8th Cir. 1983] [en banc], cert. denied, 464 U.S. 1008 [1983]), and held that "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs', §1962(c), one must

participate in the operation or management of the enterprise itself" (113 S.Ct., at p1173).

The Reves majority added that §1962(c) liability "is not limited to upper management ***. An enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management" (113 S.Ct., at p1173); however, the Court declined to decide "how far §1962(c) extends down the ladder of operation" (113 S.Ct., at p1173, n9; see also United States v Viola, 35 F.3d [2d Cir. 1994]).

The Court also recognized that an enterprise might be "operated" or "managed" by "outsiders" who will be subject to §1962(c) liability "if they are 'associated with' an enterprise and participate in the conduct of its affairs -- that is, participate in the operation or management

of the enterprise itself" (113 S.Ct., at p1173).

The Reves majority affirmed the Eighth Circuit's application of the "operation or management" test to determine whether the "outside" accounting firm (Arthur Young & Co.) was subject to §1962(c) liability (113 S.Ct., at p1173), and concluded that summary judgment was properly entered dismissing the RICO claim against Arthur Young since its involvement in the alleged RICO enterprise was limited to the preparation of financial statements for the members of the enterprise's board (113 S.Ct., at pp 1173-4). The majority rejected the argument that Arthur Young's failure to disclose to the board that the value of an asset should have been its fair market value, rather than the enterprise's actual investment in the asset, amounted to participation in or management of the enterprise (113 S.Ct., at p1174).

Not discussed in Reves was its applicability to §1962(d), RICO conspiracy. In United States v Quintanilla, 2 F.3d 1469 (1993), the Seventh Circuit held that the Reves "operation or management" test is inapplicable to RICO conspiracy. The court explained that,

> "a RICO conspiracy requires only an agreement to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity. *** 'Under this approach, it is only necessary that the defendant agree to the commission of the two predicate acts on behalf of the conspiracy.'
>
> ***
>
> We have reasoned thus because to require the government to show that all of the alleged co-conspirators conducted, or participated in the conduct of, the affairs of the racketeering enterprise to the extent mandated by §1962(c) or other substantive RICO offense would entail 'a degree of involvement in the affairs of the conspiracy that is not required in any other type of conspiracy, where agreeing to a proscribed objective is sufficient.'
>
> ***
>
> We agree with the district court for the District of

> Columbia that '[t]o hold that under §1962(d) [the government] must show that an alleged co-conspirator was capable of violating the substantive offense under §1962(c), that is, that he participated to the extent required by Reves, 'would add an element of RICO conspiracy that Congress did not direct'" (2 F.3d, at pp 1484-5).

The court declined to address the issue of "whether at least one alleged co-conspirator charged under §1962(d) must be capable of violating §1962(c)" (2 F.3d, at p1485, n21).

The Second Circuit, at least initially, was less certain than the Quintanilla court about the applicability of Reves to §1962(d). In United States v Viola, supra, 35 F.3d, at p43, the court said that,

> "[r]eversal of [the defendant's] substantive RICO conviction because he did not participate in the operation or management of the enterprise does not require automatic reversal of his conviction under RICO's conspiracy provision, 18 U.S.C. §1962(d)" (emphasis added).

However, a different Second Circuit panel, after finding that Petitioner's co-defendants, Gabe and Weinstein, both of whom (identical to Petitioner) were investigators for the RICO enterprise, "were high up on the ladder of operation" (21a), tersely stated, "Petitioner Rella was convicted only on the RICO conspiracy charge, and that conviction is unaffected by the Reves error" (21a; emphasis added).

In Jones v Meridian Towers Apartments, Inc., 816 F.Supp. 762 (D.D.C. 1993), cited with approval in Quintanilla, supra 2F.3d, at p1485, the district court concluded, inter alia, that "[n]othing in Reves *** requires that claims under §1962(d) allege management or operation of the enterprise by all of the alleged conspirators" (816 F.Supp., at p772), adding that,

> "[t]his Circuit has not yet addressed to what extent alleged co-conspirators must be involved in the underlying substantive offense to be held liable under

> §1962(d). Thus, the Court must look to other circuits for guidance. A majority of the circuits have held that a violation of §1962(d) occurs when a defendant agrees to the substantive RICO offense, regardless of whether he personally agreed to commit two predicate acts ***. The analysis in these [pre-Reves] cases applies equally to the conduct on participation requirement ***. To hold that under §1962(d) a plaintiff must show that an alleged co-conspirator was capable of violating the substantive offense under §1962(c), that is, that he participated to the extent required by Reves, 'would add an element to RICO conspiracy that Congress did not direct'" (816 F.Supp, at pp 772-3; see also Tonnemacher v Sasak, 859 F.Supp. 1273, 1277-8 [D.Ariz. 1994]; Morin v Trupin, 832 F.Supp. 93, 99 [S.D.N.Y. 1993]; Fidelity Federal Savings and Loan Association v Felicetti, 830 F.Supp. 257 [E.D.Pa. 1993]).

The courts holding that §1962(d) remained unaffected by Reves primarily relied upon two pre-Reves cases, viz: United States v Pryba, 900 F.2d 748 (4th Cir. 1990), and United States v Neapolitan, 791 F.2d 489 (7th Cir.), cert. denied, 479

U.S. 940 (1986). Both Pryba and Neapolitan were concerned with the issue of what must be agreed upon to constitute a RICO conspiracy and both cases reflect the substantial disagreement among the circuits (900 F.2d, at pp 759-60; and 791 F.2d, at pp 494-5; see also Jones v Meridian Towers Apartments, Inc., supra, 816 F.Supp., at pp 772-3, 773 n14).[3]

In seeming contrast to these cases is Aetna Cas. Sur. Co. v P & B Autobody, 43 F.3d 1546 (1st Cir. 1994), in which the

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[3]Specifically, the inter-circuit controversy was whether, as an element of RICO conspiracy, the government must prove that a defendant personally agreed to commit two or more specified predicate crimes. According to the court in Neapolitan, supra, 791 F.2d, at pp 494-5, both the First and Second Circuits had adopted the minority view that RICO conspiracy requires that each co-conspirator personally agree to commit two or more racketeering acts in violation of §1962(c) (see also United States v Pryba, supra, 900 F.2d, at p760).

court, without mentioning Reves and its applicability to §1962(d), said that,

> "[i]n addition to finding the individual Arsenal defendants liable for a RICO substantive violation with Aetna as the enterprise, the jury also found each of the individual Arsenal defendants liable for a RICO conspiracy violation under §1962(d). Liability on this theory is proved against a defendant by showing (1) the existence of enterprise affecting interstate commerce, (2) that the defendant knowingly joined the conspiracy to participate in the conduct of the affairs of the enterprise, (3) that the defendant participated in the conduct of the affairs of the enterprise, and (4) that the defendant did so through a pattern of racketeering activity by agreeing to commit, or in fact committing, two or more predicate offenses" (43 F.3d, at p1561)

As Petitioner Rella and his co-defendant's argued below (see United States v Williams, 112 S.Ct. 1735, 1738-41[1992]), in light of Reves, the government should be required, as an element of §1962(d), RICO conspiracy to violate §1962(c), to establish that a defendant agreed to

participate in directing the enterprise's affairs, or that a defendant agreed that the predicate acts be committed under the direction of upper management.

Stated another way, a defendant who, under the Reves' operation or management test, is not guilty of violating §1962(c), cannot be found to have violated §1962(d) unless he agreed to the commission of acts that involve participation in directing the enterprise's affairs. If the defendant did not agree to the commission of two or more predicate acts under the direction of upper management, the defendant should not be guilty of conspiring to violate §1962(c) (see Biofeedtrac, Inc. v Kolinor Optical Enterprises & Consultants, S.R.L., 832 F.Supp. 585, 592 [E.D.N.Y. 1993]; Morin v Trupin, supra, 832 F.Supp., at p99 [persons who are not liable under §1962(c) because they have no control over the enterprise

may be liable under §1962(d) if they conspire to control the enterprise]).

In denying §2255 relief, the Second Circuit found that the district court's jury charge that "'[t]he prosecution is not required to prove that the defendant participated in the management or control of the [RICO] enterprise'" (16a) was incorrect under Reves (see 21a). Similarly there was no instruction to the jury that, in order to convict under §1962(d), they must find that a defendant agreed to participate in directing the enterprise's affairs. Nor was the jury instructed that they must find that a defendant agreed to the commission of two or more predicate acts under the direction of upper management.

Even if the Reves' operation or management is not ordinarily applicable to a §1962(d) conspiracy to violate §1962(c), this case nevertheless requires a different

result. That is because the district court, having been persuaded that the RICO conspiracy was defectively pleaded (see Tr. 7338-41), inextricably linked the substantive RICO and RICO conspiracy by instructing the jury as follows:

> "Because of this relationship between the two counts, however, there is an exception to the general rule that your decision with respect to one count has no bearing on your decision with respect to the other. The exception is this. If you find a particular defendant not guilty of Count One (RICO) then you may not find him or her guilty of Count Two (RICO conspiracy). You simply will find the defendant not guilty of both.
>
> Only if you find a particular defendant guilty of Count One (RICO) may you go on to consider whether that defendant is also guilty of Count Two (RICO conspiracy)" (Tr. 9150-1).

Petitioner Rella's RICO conviction was set aside by the district court because the three predicate acts underlying the conviction fell outside the statute of limitations; however, Petitioner's RICO

conspiracy conviction, which was not set aside, was tied to the substantive RICO count by the district court's jury instructions. Consequently, a discussion of Reves and its relationship to Petitioner's conspiracy conviction is appropriate.

As argued below, Petitioner was an investigator, at one time employed by the enterprise, but later worked for the enterprise as an "outside" investigator. The government in its opening referred to Petitioner, and the other investigators, as "foot soldiers". Most assuredly, Petitioner was not "within the circle of people who operated or managed the enterprise's affairs" (United States v Viola, supra 35 F.3d, at p43). Petitioner's participation was limited to three predicate acts "which were undertaken without the exercise of appreciable discretionary authority *** [He] was not

consulted in the decision-making process and exercised no discretion in carrying out [management's] orders." (35 F.3d, at p43). In one of the three predicate acts, Petitioner was charged acting alone. No evidence was presented as to who, if anyone, in upper management directed him to engage in that predicate act. Had the jury been properly charged under Reves and the evidence relating to this predicate act been found to have been insufficient, thereby leaving two predicate acts, the viability of Petitioner's conviction, though minimally sufficient, would be tenuous (cf. United States v Paccione, 949 F.2d 1183, 1197-8 [2d Cir. 1991]).

In short, certiorari should be granted to review the substantial federal question remaining after this Court announced the "operation or management" test in Reves v Ernst and Young, 113 S.Ct. 1163 (1993), whether that test is applicable to a RICO

conspiracy to violate §1962(c), at least to the extent of requiring that the government prove that a defendant agreed to participate in the affairs of the RICO enterprise or that a defendant agree that two predicate acts be committed at the direction of upper management.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
March 19, 1995

Respectfully submitted,

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